SUPREME COURT, U. S.

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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1423~~ 192

UNITED STATES OF AMERICA,
PETITIONER,

v.

SANDRA & DENNIS FISHING CORPORATION, ET AL.,
RESPONDENTS.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. Question Presented

The question presented by the petitioner is simple but as stated is not couched in the language of the case and has no application to the facts and circumstances of the case. The question couched in the language of the case is as follows:

Where the Government provided a SAR service and organization on a grand scale, engendering reliance on the excellent service rendered and pre-empting the field, is there a duty owed to a disabled fishing vessel taken in tow by a Coast Guard patrol vessel on a routine SAR mission

to navigate with reasonably good seamanship so as not to tow the said fishing vessel on well-known shoals?

The respondents reserve the subsidiary question, namely, can the Court below upon examining the record to determine whether the findings of fact and the conclusions of the District Court are clearly erroneous, adopt discarded testimony, engage in inferences of its own, select testimony that it regards as more credible and in short grant a trial *de novo* contrary to the clear pronouncements of this Court?[1]

II. Statement of the Case

The statement in the petition is inadequate and a more complete statement is necessary.

The petitioner (Government) brought a petition for exoneration or limitation of liability for the loss of a fishing vessel (Barbara and Gail) with the resulting death of five of her crew and personal injuries to four of her survivors (R. 19). This casualty occurred on December 19, 1961, shortly before 1:25 a.m. (G. Ex. 37, R. 637, G. Ex. 39, R. 639) when a Coast Guard patrol vessel (95321) on a routine SAR mission, in weather not severe and in good visibility (G. Ex. 52, R. 655) towed the fishing vessel on well-known, dangerous shoals, Rose and Crown Shoals (R. 295, Petition 25, 61) when considerably off course, 6-7 miles (R. 292, Pet. 25, 61) due to faulty navigational instruments and navigation (Pet. 33-35, 45-47, 66), it mistook the light of Sankaty Head Lighthouse for the light of

[1] The Court below discarded the finding of the District Court that the commanding officer of the Coast Guard patrol vessel was negligent in failing to identify Sankaty Head Lighthouse and mistaking it for Great Round Shoals buoy light (Pet. 28, Footnote 7, 29 Footnote 8, 55 to 59, 66) and the finding that the tow line parted due to negligence (Pet. 27, Footnote 6, 48-50).

Great Round Shoals (GRS) buoy that it was expecting to see (Pet. 56-58, 66).

After a lengthy trial, the District Court rendered an opinion containing its findings of facts and conclusions (Pet. 41-73) and entered a decree thereon denying both exoneration and limitation of liability (R. 571). In summary, the District Court judge held that since the Coast Guard undertook a SAR service and operated a SAR organization, engendering reliance on the competent assistance usually afforded by the vessels engaged therein, it was obligated to use due care to maintain said vessels and their equipment in reasonably good working order; *and* if the said vessels and its equipment were not reasonably fit for the job, then the Coast Guard was *further* obligated to use due care to discover said fact and to repair them or give warning of their unfitness, paraphrasing the language used by this Court in *Indian Towing Co. v. U.S.*, 1955, 350 U.S. 61, 69 (Pet. 65-66). The District Court judge said that the Government closes its eyes to reality when it equates the Coast Guard's rescue operations to that of a private salvor who goes to the aid of a vessel in distress (Pet. 64). The nature and extent of these activities are so well known that all those who go down to the sea in ships have been induced to rely on this usual excellent service and to forego other means of assistance (Pet. 64-65). The District Court judge also held that having undertaken the mission due care must be exercised in performing the mission and it denied exoneration because (1) the Coast Guard assigned to the mission, a vessel equipped for a long time with a defective loran, a defective gyro-compass and repeater, a defective fathometer and a totally inoperative radio-direction finder, RDF, (Pet. 45-47, 66); (2) the commanding officer of the patrol vessel (McManus) had failed to report to SAR Headquarters his vessel's incapabilities due to the mass of

defective navigational equipment (Pet. 66);[2] (3) McManus undertook the mission with the mass of defective navigational equipment (Pet. 66); (4) McManus failed to inform the fishing vessel that he was navigating with this mass of defective navigational equipment (Pet. 66); (5) McManus relied on his defective loran and assumed he got accurate readings therefrom (Pet. 66); (6) McManus committed an incredibly reprehensible act when he shut off his loran on December 18th at 11:40 p.m. because it failed completely without obtaining a loran bearing from the fishing vessel (Pet. 54, 66); (7) McManus failed to identify Sankaty Head Lighthouse and mistook it for Great Round Shoals buoy (Pet. 55-59, 66); and (8) that these negligent acts and omissions were the proximate causes of the losses suffered by the respondents (Pet. 66).[3]

The District Court judge ruled that the claimants do not have to prove that they were deprived of available assistance from other sources as the Government contended, but if such proof is required then the record discloses (1) that the fishing vessel had a ship-to-shore radio telephone in good working order; (2) that the fishing vessel was on fishing grounds commonly used by the New England fishing fleet; and (3) that it did pass up other available assistance (Pet. 67-68).

The District Court judge ruled that the loss of the Barbara and Gail with its resultant deaths and personal injuries to her crew was an independent and distinguishable injury from the peril it faced when the tow line was

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[2] At the time of this mission SAR vessels were not required to report to SAR Headquarters their incapabilities, subsequently corrected (R. 149-150, Pet. 71). However, there was a General Prudential Rule which required a commanding officer assigned to a mission to report to SAR Headquarters his vessel's incapabilities (R. 150, G. Ex. 21, R. 607, Pet. 71).

[3] There were other negligent acts or omissions found, such as failure to take the southerly route which was slightly longer but shoal free (R. 359-360, Pet. 66).

first attached or reattached (Pet. 68-70). According to the Government's expert (Bumpus) if the fishing vessel were allowed to drift from its position when the tow line was attached, it would have drifted out through South Channel, clear of any shoals (Pet. 69). The trial judge rejected Bumpus' testimony that if the tow line was not reattached it would have drifted onto shoals for it assumes that the fishing vessel would not have used her dredges as sea anchors and assumes weather conditions that the log of the 95321 refutes (Pet. 69-70).

The Court below on review of the opinion of the District Court and upon examination of the record affirmed the decree insofar as it denied limitation of liability with instructions to enter a new decree granting limitation of liability (Pet. 39). The Court below ruled that (1) there is no duty owed by the Coast Guard to a disabled vessel to use due care to maintain their vessels and their equipment in reasonably good working order (Pet. 31); (2) that the only duty owed to a disabled vessel is to warn it of any unfitness for the mission and exercise good seamanship in performing the mission (Pet. 31); (3) that there was no duty to warn the fishing vessel in this case because the Court below rejected the District Court's finding that the 95321 was not fit for the mission and substituted its own finding that it was, adopting the testimony of Waters that the mission could be accomplished at the time it was commenced, bearing in mind the moderate weather and good visibility, in spite of its mass of defective navigational instruments[4] (Pet. 32); that McManus' failure to report his vessel's deficiencies under the General Prudential Rule (G. Ex. 21, R. 607) was irrelevant because of the adoption of Water's testimony by the Court below (Pet. 39).

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[4] The Court below said that Waters could have added a further fact that the 95321 had available the loran of the fishing vessel for the asking (Pet. 32, Footnote 14).

The Court below held that whatever may be the limits of the principle with respect to volunteered salvage, if the Coast Guard accepts a mission, it should conduct its share of the proceeding with acceptable seamanship. "We refuse to take the Government's view, and be party to adding to the honored motto, '*Semper Paratus*', the words '*Interdum Prudens*'" * (Pet. 36). It affirmed that part of the decree denying exoneration of liability because it held that (1) when McManus last set his course for New Bedford at 11:00 p.m. on December 18th, his loran position was inaccurate for he could not possibly have stranded where he did if it were accurate (Pet. 35); (2) McManus placed false confidence upon his defective loran and assumed he got correct positions from it (Pet. 33-34); (3) that at 11:45 p.m. on December 18th when the loran broke down completely, he shut it off and failed to avail himself of the fishing vessel's loran which was available for the asking and this was a highly irresponsible act (Pet. 34), and (4) had he done so, he would have discovered his error and the casualty would have been avoided (Pet. 35).

The Court below was unimpressed, as was the District Court, with the Government's claim that had the 95321 not appeared at all, the fishing vessel would have been lost in any event and that this contention requires no discussion (Pet. 37).

III. Reasons for Denying the Writ

A. The Petitioner Has Not Been Aggrieved.

1. The petitioner argues that the Court below has imposed a higher duty upon the Government when engaged on a SAR mission than that imposed upon a private ship-

* "Always ready, Sometimes careful".

owner. As a matter of fact the duty imposed by the Court below was merely to exercise reasonably good seamanship in performing the mission, if the Government undertook it. The Court below said it would not tarnish the motto, "Always Ready", by adding, "Sometimes Careful" (Pet. 36).

It should be noted that this is not a case of an unsuccessful rescue attempt under trying circumstances where a court can regard the situation with a benevolent eye (*Frank* v. *U.S.*, 1957 3rd Cir., 250 F.2d 178, 180). Here the fishing vessel was under tow and it became merely a matter of navigation. If one were to apply the duty that was owed by a private salvor (Good Samaritan) it would be to exercise reasonable care over the property or persons in his custody (*The Noah's Ark* v. *Bentley & Felton Corp.*, 1961, 5th Cir., 292 F.2d 437, 440; Norris, *Law of Salvage*, 1958, § 120 at 205-206; *U.S.* v. *Lawter*, 1955, 5th Cir., 219 F.2d 559, 562; *Geerston* v. *U.S.*, 1955, 3rd Cir., 223 F.2d 68, 70-71; *The Cape Race*, 1927, 2nd Cir., 18 F.2d 79, 81).

The District Court by its findings resolved the question that the petitioner has posed. Even employing the standard of law applicable to a private salvor (Good Samaritan) it found as a fact (a) that the plight of the fishing vessel was worsened by reason of the SAR mission (Pet. 67-69) and (b) the claimants sustained both an independent and distinguishable injury (Pet. 70). The Court below stated that it was unimpressed as was the District Court, that the fishing vessel would have been lost in any event had the rescue mission not been undertaken and that its unsuccessful attempt to establish this contention required no discussion (Pet. 37). It is, of consequence, to note that the petitioner has not argued that these findings of fact are *plainly wrong*.

The petitioner relies heavily on *Frank* v. *U.S.*, 250 F.2d 178, 179, quoting therefrom but it fails to realize that the court clearly understood (a) that the Coast Guard was in

no way responsible for Frank's falling into the sea and (b) owed no duty to rescue him as in the case of a crew member or passenger who falls into the sea.[6]

2. The petitioner got the benefit of better law than what it was entitled to.

The Court below ruled that the Coast Guard was not obligated to use due care to maintain its vessels and their equipment employed in SAR missions in reasonably good working order but merely to give warning of any unfitness of its vessel for the mission contrary to a clear pronouncement of this Court in *Indian Towing Co.* v. *U.S.*, 1960, 350 U.S. 61, 69 and the duty owed was merely to perform the mission with reasonably good seamanship, if it undertook the mission (Pet. 31, 35-36). The Court below upset basic findings of the District Court that were not *plainly erroneous*[7] and granted a trial *de novo* contrary to clear pronouncements of this Court (*McAllister* v. *U.S.*, 1954, 348 U.S. 19, 20; *Guzman* v. *Pichirilo*, 1962, 369 U.S. 698, 702; *Morales* v. *City of Galveston*, 1962, 370 U.S. 165, 167-168.

The petitioner fails to comprehend that the duty owed by the Government in a SAR mission is likened to that of

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[6] The court said, (a) "There has been no showing that any fault of the Coast Guard contributed in any way to Frank's falling into the sea. Nor did the Coast Guard in any way worsen his plight thereafter" (P. 179) and (b) "An obligation to render aid may grow out of a relationship such as master and servant or ship and crewman, cases cited. But there is no such relational basis for a duty here" (P. 180).

[7] The Court below upset basic findings of the District Court (a) that the C. G. 95321 was not a proper vessel to dispatch for the mission (claimants' Pet. 9, 14-15); (b) that McManus was negligent in failing to identify Sankaty Head lighthouse and mistaking it for GRS buoy light (Pet. 28, Footnote 7, 29 Footnote 8, 55-59, 66); (c) that the tow line parted due to negligence (Pet. 27, Footnote 6, 48-50) and that the commanding officer of the C. G. 95321 was negligent in failing to take the southerly route which was slightly longer but shoal free (claimants' Pet. 7, Footnote 2).

a private person only in such circumstances where private persons render the same service *under like circumstances* and to the extent that the circumstances differ, the duties owed by the Government vary but do not fail (*Indian Towing Co.* v. *United States*, 1955, 350 U.S. 61, 68-69; *Rayonier, Inc.* v. *United States*, 1957, 352 U.S. 315, 319-320; *United States* v. *Gavagan*, 280 F.2d 319, 327-328).

The Government undertook SAR as a governmental function on a grand scale (R. 74-75, 146-147, Pet. 64-65) which it was permitted to do by statute (14 U.S.C. § 88 (a) (1)), and (b) (Claimants' Pet. 53), and directed to do by the National Search and Rescue Plan promulgated in March, 1956 by the President's Air Co-ordinating Committee (*United States* v. *Gavagan*, 280 F.2d 319, 322, 5th Cir., 1960). These services, all well publicized, known to mariners who rely upon and avail themselves of them to the exclusion of others competent of rendering such service (Pet. 64-65). The duty owed by the Government in performing such a SAR service can hardly be equated to that owed by a private salvor who acts as a Good Samaritan. As pointed out in *U.S.* v. *Gavagan*, 280 F.2d 319, 324-328, the Government unlike a private salvor has no right, either absolute or qualified, to abandon or withdraw from the mission and was bound to continue the mission until good judgment required termination. To equate the duty of the Government to a private salvor, it would have to be a private salvor engaged in the business on a scale equal to that of the Government.[8]

Since there is no such private salvor a court must fashion the duty. It is characteristic of the maritime law to apply a single standard of care in nearly every situation dis-

[8] A private salvor in the business of salvage warrants both his equipment and his workmanship (*Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 1956, 350 U.S. 124, 132-134 culminating in *Italia Societa* v. *Oregon Stev. Co.*, 1964, 376 U.S. 315, 320).

daining the refinements of the common law (*Kermarec* v. *Compagni Generale Transatlantique*, 1959, 358 U.S. 625, 630-632). The least that can be expected of the Government performing a SAR service is once it takes the vessel in tow is to navigate with reasonably good seamanship.

IV. Conclusion

The petitioner is really seeking a review in this Court to upset the finding of fact of the District Court affirmed on appeal that the Government is solely to blame for the tragic loss of the claimants (Pet. 11, Footnote 8, Pet. 38, Claimants' Pet. A52). For the aforesaid reasons this petition should be denied without prejudice to the claimants' petition heretofore filed (docket number 1404).[9]

Respectfully submitted,

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[9] The respondents are: Ellis Kendall, Edgar Lawrence Kent, Yves Adrien Redureau, Clarence Roberts, Fred M. Thomas, Admr. of Estate of Roger Desroches, David J. Grant, Admr. d/b/n Estate of Calvin Roberts, Maria do Carmo Costa, Admx. of Estate of Joseph Costa, Jr., Judith Wicherski, a minor by Fred M. Thomas, Mary Wicherski, Admx. of Estate of Walter Wicherski and Eleanore McCarthy, Admx. of Estate of Terrence McCarthy.